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July 2015

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## Recommended Citation

Jansen, Yakaré-Oulé (2007) "The Right to Freely Have Sex? Beyond Biology: Reproductive Rights and Sexual Self-Determination," *Akron Law Review*: Vol. 40 : Iss. 2 , Article 3.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol40/iss2/3>

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# THE RIGHT TO FREELY HAVE SEX? BEYOND BIOLOGY: REPRODUCTIVE RIGHTS AND SEXUAL SELF-DETERMINATION

*Yakaré-Oulé Jansen\**

## INTRODUCTION

Sex is a difficult subject for us. It is an inevitable part of our lives and identities, no matter how we choose to deal with it; either by living a life of celibacy or by means of an open manifestation of our sexuality. Yet, like that other notorious constant factor in life, death, we find it very difficult to discuss anything having to do with it. Some of the greatest minds in history have struggled with the subject,<sup>1</sup> and the great

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1. Although sometimes contradictory in his statements on love and sex, Plato generally considered sex to be of secondary importance. In his ode to love, *The Symposium*, he emphasizes that virtuous love between men should not be about sex, but about improvement and education of the soul. PLATO, *The Symposium*, in *PLATO'S EROTIC DIALOGUES* 15, 21-25 (William S. Cobb trans., State University of New York Press 1993) (1800). In *The Republic*, he in fact argues for free sex, but only as a means to satisfy what he considers more of an animal appetite that sometimes cannot be suppressed and which has the sole aim of breeding children. PLATO, *PLATO'S REPUBLIC* 117 (G.M.A. Grube trans., Hackett Publishing Co. 1974). Descartes considered the mind to be separate from the mechanical body, considering man a spirit who makes use of a body. RENÉ DESCARTES, *DISCOURSE ON THE METHOD AND MEDIATIONS ON FIRST PHILOSOPHY* 3 (David Weissman ed., Yale University Press 1996). Schopenhauer acknowledged that sex permeates everything in our lives, but he never hid his disdain for matters related to love, which he considered an illusion, a trick of nature to facilitate sex between partners that make a good genetic match. ARTHUR SCHOPENHAUER, *Metaphysics of Love*, in *ESSAYS OF SCHOPENHAUER*, available at <http://etext.library.adelaide.edu.au/s/schopenhauer/arthur/essays/chapter12.html> (originally published in the second edition of *DIE WELT ALS WILLE UND VORSTELLUNG* [THE WORLD AS WILL AND REPRESENTATION] in 1844). But the most prominent name that springs to mind when talking about sex is Freud, who allegedly said that "the only unnatural sexual behavior is none at all" and published his *DREI ABHANDLUNGEN ZUR SEXUAL THEORIA* in 1905 (SIGMUND FREUD, *THREE ESSAYS ON THE THEORY OF SEXUALITY* (James Strachey trans., The Alcuin Press 1949)).

taboo on nudity and sex in American media<sup>2</sup> shows that even societies which boast an enormous sex industry<sup>3</sup> sometimes still do not quite know how to deal with sex in day-to-day life. Yet, sex is at the basis of our very existence, not only for the biological aspect of procreation, but also because of its connection to our deepest sense of self. Sex is one of the most private aspects of who we are.

How does the law deal with sex? How is sex part of the human rights body? What rights related to sex exist and, more specifically, what is the position of women in all of this?<sup>4</sup>

At the International Conference on Population and Development held in Cairo in 1994, the following definition of reproductive health was endorsed by 165 nations:

Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. *Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so.* Implicit in this last condition is the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant.

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2. A recent example is the storm caused by the event referred to in the media as 'nipplegate' when during a performance on MTV's Superbowl Football Show, singer Justin Timberlake exposed the breast of Janet Jackson. The broadcasting network CBS was subsequently flooded with complaints of families, stating that "the family tradition had been interrupted by unexpected nudity" and received a fine of \$550,000 USD. Julie Hilden, *Jackson 'Nipplegate' illustrates danger of chilling free speech*, CNN, (Feb. 20, 2004), <http://www.cnn.com/2004/LAW/02/20/findlaw.analysis.hilden.jackson/index.html>.

3. The US porn industry has been estimated to generate between \$10 billion and \$12 billion USD in annual profits. A great number of Fortune 500 companies, like AT&T and Time Warner, collect a significant portion of that sum. See James Harder, *Porn 500 – blue chip connections to porn industry – Statistical Data Included*, Jan. 8, 2001, [http://www.findarticles.com/p/articles/mi\\_m1571/is\\_2\\_17/ai\\_72273779](http://www.findarticles.com/p/articles/mi_m1571/is_2_17/ai_72273779); Timothy Egan, *Wall Street Meets Pornography*, N.Y. TIMES, Oct. 23, 2000, at A1, available at <http://www.nytimes.com/2000/10/23/technology/23PORN.html?ex=1145246400&en=c98aee53f024bce0&ei=5070>.

4. A number of issues raised in this article can be applied to matters of sexual orientation, and on occasion the topic will come up to support an argument made for women's rights. The focus, however, will primarily be on women because it would be impossible to do justice to the sexual orientation perspective within the confines of this brief article.

[emphasis added]<sup>5</sup>

The Cairo Programme's definition of reproductive health was affirmed and elaborated a year later by the Beijing Declaration and Platform for Action:

The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between women and men in matters of reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behaviour and its consequences. [emphasis added]<sup>6</sup>

The aim of this article is to explore the extent to which women's reproductive rights embrace the concept of sexual self-determination,<sup>7</sup> i.e., the right of women to enjoy their sexuality on an equal basis with men, free from any form of coercion or pressure and with the freedom to decide if and when to reproduce. My thesis is that so far the focus has primarily been on reproductive health and that women's equality in the sexual arena warrants more attention as it is both interconnected with a number of fundamental human rights and an important aspect of the general concept of self-determination, which women should be able to pursue on a par with men.

Part I will briefly set out how sexual rights are approached in the national legal arena. The way the U.S. Supreme Court treats reproductive rights provides a good example as it has some analogies with the treatment of reproductive rights under international human rights law;<sup>8</sup> the Court focuses primarily on the biological aspects of sexuality and has been reluctant to acknowledge rights that fall within the realm of sexual self-determination.<sup>9</sup> This case study is followed in

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5. *Programme of Action of the International Conference on Population and Development*, Cairo, Egypt, Sept. 5-13, 1994, ch. 7, U.N. Doc. A/CONF.171/13/Rev.1 (Mar. 1995) [hereinafter *ICPD Programme of Action*].

6. *Beijing Declaration and Platform for Action, Fourth World Conference on Women*, Beijing, China, Sept. 4-15, 1995, ch. IV, § C, para. 96, U.N. Doc. A/CONF.177/20 (1996) [hereinafter *Beijing Declaration & Platform for Action*].

7. As this survey pertains to the freedom to make independent decisions about one's sex life on the basis of international human rights norms, I prefer to use the term "sexual self-determination" to distinguish it from the terms used for this concept within national law, such as "sexual sovereignty" and "sexual citizenship," in particular because of the link it suggests between sexuality and self-realization. The term "sexual rights" has a more general scope but is used interchangeably with "reproductive rights" on occasion.

8. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roe v. Wade*, 410 U.S. 113 (1973).

9. See, e.g., *Lawrence v. Texas*, 539 U.S. 558.

Part II by an analysis of to what extent the treaty bodies of the International Covenant on Civil and Political Rights (“ICCPR”), International Covenant on Economic, Social and Cultural Rights (“ICESCR”) and Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) consider women’s sexuality in connection with the reproductive rights found in the respective treaties and to what degree these comments extend beyond the realm of reproductive health. I will then proceed with an evaluation of the need for a more extensive interpretation or an adjusted definition of reproductive rights in Part III.

#### PART I: LAW AND SEXUALITY

When it comes to sex, women are primarily the ones to find that their bodies are highly regulated by the law. Laws on abortion, contraception, and maternal conduct during pregnancy as well as welfare regulations intended to deter women from having children<sup>10</sup> hardly affect men. In addition, there are a number of persistent stereotypes to complicate matters, both on a personal level and in the legal arena, where equality according to the letter of the law does not always apply in practice due to its application by judges or juries.<sup>11</sup> This treatment of women and their sexuality fits within a historical pattern, in which a woman’s sexuality was not hers to make decisions on; across cultures, her sexuality belonged to her family, tribe, or lineage and not to herself.<sup>12</sup> Securing a good marriage had financial consequences for a

10. For an extensive overview of the problems women encounter when it comes to these matters, see JUDITH GREENBERG, MARTHA MINOW & DOROTHY ROBERTS, MARY JOE FRUG’S WOMEN AND THE LAW 649-776 (3d ed. 2004).

11. Consider the way a woman’s behavior as a wife and mother is evaluated as opposed to the behavior of the father when pursuing a career at the same time as raising a family and how this reflects on custody decisions. D. Kelly Weisberg points out a number of gender stereotypes, including the performance of certain symbolic child care tasks a mother “should” perform, and the consideration that a woman’s dedication to her career is a sign of unfitness as a parent, which stands in stark contrast of the man’s idealized image as a “good provider” when he spends a significant amount of time on work instead of his family. D. Kelly Weisberg, *Professional Women and the Professionalization of Motherhood: Marcia Clark’s Double Bind*, 6 HASTINGS WOMEN’S L. J. 295, 313-38 (1995). On equal opportunities in the workplace and its distortion due to fixed ideas about gender, see generally Vicki Schultz, *Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990). On the impact of race and gender on rape law, see generally Kimberlé Crenshaw, *Mapping the Margins: Identity Politics, Intersectionality and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991). On unconscious bias and equal employment opportunity legislation, see generally Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

12. Oliver Phillips, *A Brief Introduction to the Relationship Between Sexuality and Rights*, 33

woman's family or tribe, and in order for a good marriage to be secured, a woman (or girl) had to be chaste before anything else.<sup>13</sup> Forced marriages and dowers may not be the order of the day in this hemisphere,<sup>14</sup> but it can be argued that women's sovereignty over their bodies continues to be severely curtailed until this day, be it by different means.

There are no sexual rights mentioned in the Constitution. The right to use contraception and the right to have an abortion, however, have been brought under the heading of privacy by the Supreme Court.<sup>15</sup> The connection between privacy and sex seems to be quite a natural combination; Abramson refers to them as "natural bedfellows."<sup>16</sup> Probably most of us would answer 'no' when asked whether we would like the State in our bedrooms, the place where we commit our most private acts. Yet, the Supreme Court's notion of privacy all but allows us to do whatever we please in private, drawing the line when it no longer comes to reproductive sex.<sup>17</sup>

The *Griswold* case<sup>18</sup> recognized the right to make decisions on

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GA. J. INT'L & COMP. L. 451, 464 (2005).

13. *Id.*

14. Obtaining statistics on the prevalence of forced marriages in the United States and Europe has proven to be difficult. In a 2005 publication on legislation on forced marriages in Council of Europe countries, the Council concluded that none of the surveyed countries had carried out any thorough quantitative research on the matter. Edwige Rude-Antoine, *Forced marriages in Council of Europe member states: A Comparative Study of Legislation and Political Initiatives*, COUNCIL OF EUROPE, 7 (2005), available at [http://www.coe.int/T/E/Human\\_Rights/Equality/PDF\\_CDEG%282005%291\\_E.pdf](http://www.coe.int/T/E/Human_Rights/Equality/PDF_CDEG%282005%291_E.pdf). Generally, countries make a connection between the prevalence of forced marriages and migration flows, an example of which is the Norwegian Human Rights Service's publication on the position of Muslim women in Norway, HEGE STORHAUG & HUMAN RIGHTS SERVICE, *FEMININ INTEGRERING - UTFORDRINGER I ET FLERETNISK SAMFUNN* [HUMAN VISAS: A REPORT FROM THE FRONT LINES OF EUROPE'S INTEGRATION CRISIS] (2003).

15. Vehemently opposing the public/private distinction is Catharine MacKinnon, who argues that privacy is a false notion for women, as the private sphere is constructed to perpetuate abuse against women. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 168-69 (1989). See also CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (Harvard University Press 1987). Denominating certain matters as strictly private arguably takes away the responsibility of government to undertake action as well as for human rights groups to intervene. See Dina Bogecho, *Putting it to Good Use: The International Covenant on Civil and Political Rights and Women's Right to Reproductive Health*, 13 S. CAL. REV. L. & WOMEN'S STUD. 229 (2004).

16. PAUL R. ABRAMSON, STEVEN D. PINKERTON & MARK HUPPIN, *SEXUAL RIGHTS IN AMERICA: THE NINTH AMENDMENT AND THE PURSUIT OF HAPPINESS* 45 (NYU PRESS 2003).

17. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965); *Roe v. Wade*, 410 U.S. 113, 153-54 (1973); *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003); *Lawrence v. Texas*, 539 U.S. 558 (2003).

18. *Griswold*, 381 U.S. at 485-86.

contraception under the denominator of privacy, as did *Roe v. Wade*<sup>19</sup> for the right to have an abortion. Yet as soon as the link with reproduction is missing, the privacy argument appears to lose its persuasiveness for the Court. In *Bowers v. Hardwick*,<sup>20</sup> the Supreme Court concluded that privacy did not extend to homosexual relationships, upholding a Georgia statute against sodomy. In the more recent *Lawrence v. Texas*,<sup>21</sup> the Court tackles the problem of same-sex sexual relations from a different angle: liberty.<sup>22</sup> The decision has been celebrated as heralding the next step in the struggle for gay and lesbian equality, but when one reads the judgment closely, the Court has not been as generous at it may seem. Strictly speaking, the sex in this case could never actually be reproductive, but the way the Court interprets the type of relationship between the two men does evoke all the traditional connotations that come up with the idea of reproductive sex.<sup>23</sup> As Katherine Franke argues in her critical reading of *Lawrence*,<sup>24</sup> the Court – in spite of its qualification of sodomy laws as “demeaning the lives of homosexual persons”<sup>25</sup> – stresses in several ways that the relationship between Lawrence and his partner resembles that of a married couple and that the sex constitutes but an element in a more enduring bond.<sup>26</sup> “More enduring than what?” Franke rightly asks, “Than sex?”<sup>27</sup>

Franke observes that *Lawrence* acknowledges sex only as instrumental to the formation of intimate relationships and not as something that has a social or legal status in its own right.<sup>28</sup> Obviously, the Court did not take to heart the dissent written by Justice Blackmun in the *Bowers* case:

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19. *Roe*, 410 U.S. at 153-54.

20. *Bowers*, 478 U.S. at 196.

21. *Lawrence v. Texas*, 539 U.S. 558 (2003).

22. It remains to be seen whether the Supreme Court is willing to approach the issue of abortion from the same angle. Several European Constitutional Courts have taken this stance, declaring that liberal abortion laws are consistent with women's right to liberty. See, e.g. *Juristenvereniging Pro Vita/ De Staat der Nederlanden*, Hoge Raad, The Hague, February 8, 1990, *NJ* 413, 707 (English summary in 19(5) *EUR. LAW. D.* 179-180 (1991)).

23. *Lawrence*, 539 U.S. at 567.

24. Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 *COLUM. L. REV.* 1399, 1408 (2004).

25. *Lawrence*, 539 U.S. at 567.

26. *Id.*

27. Franke, *supra* note 24, at 1408.

28. *Id.* at 1417. Lisa Rabie argues that the Court in *Lawrence* does hint at the principles constituting full sexual citizenship (sexual equality, sexual dignity, and sexual privacy), but stops short of formulating any robust notion of sexual citizenship and instead creates a very narrow liberty right. Lisa Limor Rabie, *Can You Put on Your Red Light?: Lawrence's Sexual Citizenship Rights in Terms of International Law*, 43 *COLUM. J. TRANSNAT'L L.* 613, 616 (2005).

Only the most willful blindness could obscure the fact that sexual intimacy is “a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality” . . . . The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many ‘right’ ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds. . . . The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.<sup>29</sup>

Blackmun is right, and – as Franke points out – the Supreme Court got it wrong again in *Lawrence*. Abramson argues: “Sexual choices reflect *individual* rights, not rights that emerge only in relationships; these rights are not limited to dyads, whether heterosexual or homosexual, or to particular types of relationships (e.g., marriage).”<sup>30</sup> But without explicit wording in the law, and a Court that is not willing to give much freedom to individuals to determine what they want to do with their bodies together with other consenting adults, there appears not to be much room for independent sexual rights outside the sphere of marriage or marriage-like relationships.

## PART II: SEXUAL RIGHTS AS HUMAN RIGHTS

### A. *Sexual rights as human rights*

Not all rights are enumerated. This goes for both national legislation (see, for example, the body of rights that has been read into the Constitution) and the international human rights treaty regimes with their subsequent comments, explanations, and interpretations by both treaty monitoring bodies and courts. The premise that sexual expression or self-determination is a natural right seems viable,<sup>31</sup> applicable to each and every one of us, as it goes to the very heart of our existence, whether you would like to place it under the Constitutional denominator of the

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29. *Bowers*, 478 U.S. at 205-06.

30. ABRAMSON ET AL., *supra* note 16, at 16.

31. *Id.* at 74-77.



‘pursuit of happiness,’<sup>32</sup> the right to be able to determine the way one leads one’s life in a way one sees fit, or under any of the rights embodied in the current human rights treaty regime pertaining to some form of self-determination. Naturally, there are limitations that should be considered as on the exercise of almost any of the other rights and freedoms. Enjoyment of one’s rights should not encroach upon another person’s rights and freedoms, which means that certain forms of sexual expression – such as sex involving partners who did not consent or are not in a position to reasonably do so – may be legitimately regulated.<sup>33</sup>

The Center for Reproductive Rights (“CRR”), in its publication ‘Reproductive Rights are Human Rights,’<sup>34</sup> voices the idea that all persons have reproductive rights, founded upon principles of human dignity and equality.<sup>35</sup> These reproductive and sexual rights can be divided into a number of principles that fall into two categories: the right to reproductive health care and the right to reproductive self-determination. According to the CRR, they are “grounded in some of the oldest recognized human rights.”<sup>36</sup> The Cairo Programme of Action

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32. *Id.*

33. Examples mentioned by Fried and Landsberg-Lewis are rape and incest. Susana T. Fried & Ilana Landsberg-Lewis, *Sexual Rights: From Concept to Strategy*, in WOMEN AND INTERNATIONAL HUMAN RIGHTS, Vol. 3, 92 (Kelly D. Askin & Dorean Koenig eds., Transnational Publishers 2001). A difficulty is that some would argue that same-sex relations offend a public sense of morality and therefore fall within the permissible area of control under the law. Arguably, a moral offense is not the same as a mental or physical harm, but it is certainly difficult to draw the line by either standard as there are always situations that do not conform to the rule. One could think of S/M sex between consenting adults, which strictly speaking can involve physical harm but on a voluntary basis, or marital rape, which involves both non-consent and mental or physical harm, but often is not proscribed by law.

34. CENTER FOR REPRODUCTIVE RIGHTS, REPRODUCTIVE RIGHTS ARE HUMAN RIGHTS (4th ed. 2003), available at [http://www.reproductiverights.org/pub\\_bo\\_rrhr.html](http://www.reproductiverights.org/pub_bo_rrhr.html).

35. *Id.*

36. The Center for Reproductive Rights and Policy and University of Toronto International Programme on Reproductive and Sexual Health Law, *Bringing Rights to Bear: An Analysis of the Work of UN Treaty Monitoring Bodies on Reproductive and Sexual Rights*, 17 (2002). For the subject of sexual self-determination, a number of the ‘Ten Human Rights Keys to Reproductive Rights’ are relevant: the right to life, liberty, and security, Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 3, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR], International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 6(1), 9(1), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR]; the right to health, reproductive health, and family planning, International Covenant on Social, Economic and Cultural Rights, G.A. Res. 2200A (XXI), art. 10(2), 12(1), & 12(2), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICESCR], Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), G.A. Res. 34/180, art. 10(h), 12(1), 12(2) & 14(2), U.N. Doc. A/34/46 (Dec. 18, 1979) [hereinafter CEDAW]; the right to decide the number and spacing of children, CEDAW, *supra*, at art. 16(1); the right to privacy, ICCPR, *supra*, at art. 17(1), 17(2); the right to be free from discrimination on specified grounds, UDHR, *supra*, at art. 2, ICESCR, *supra*, at art. 2(2), ICCPR, *supra*, at art. 2(1), CEDAW, *supra*, at art. 1(3), & 11(2); and the right to be free from sexual violence, CEDAW, *supra*, at art. 5(a), 6, CENTER FOR

affirms that reproductive rights are already embedded within the current international framework:

[R]eproductive rights embrace certain human rights that are already recognized in national laws, international laws and international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes the right to make decisions regarding reproduction free of discrimination, coercion and violence, as expressed in human rights documents.<sup>37</sup>

Incorporated in this right is the ability to “have a satisfying and safe sex life” and the capability “to reproduce and the freedom to decide if, when and how often to do so.”<sup>38</sup>

In spite of this broad phrasing, the Cairo Programme of Action as a whole (as well as the Beijing Declaration one year later<sup>39</sup>) places great emphasis on sex as a biological function. The greatest concerns appear to be family planning and the good health of mothers and children. The second focal point is freedom from violence or coercion. The linkage of reproductive health and protection from sexual harm with human rights may have reached a broad audience, but it is questionable whether it does the overall case for women’s equality much good. As Alice Miller argues, a focus on women reduced to “suffering bodies in need of protection by the law and by the State” can frustrate more fundamental goals, such as women’s need for participation and equality.<sup>40</sup> Franke asserts that women’s rights to enjoy their own bodies is generally absent from feminist legal theory, the debate being focused on framing female sexuality as a question of dependency or danger rather than a source of pleasure.<sup>41</sup> Moreover, she asks why the fact that most women will be

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REPRODUCTIVE RIGHTS, *supra* note 34 at 41).

37. *ICPD Programme of Action*, *supra* note 5, at ch. 7. The Beijing Platform affirms what is said in the Cairo Declaration, by stating that “reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents.” *Beijing Declaration & Platform for Action*, *supra* note 6, at para. 95.

38. *ICPD Programme of Action*, *supra* note 5, at ch. 7.

39. *Beijing Declaration & Platform for Action*, *supra* note 6.

40. Alice Miller, *Sexuality, Violence Against Women and Human Rights: Women make Demands and Ladies get Protection*, *Health & Human Rights: An International Journal* 16, 25 (2004).

41. Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law and Desire*, 101 COLUM. L. REV. 181, 199 (2001).

reproductive is so readily accepted.<sup>42</sup> Sex beyond reproduction – just for pleasure, between same-sex partners or for economic motives – takes the back seat here, just as it does for the Supreme Court. Focusing on the reproductive aspect of sexual rights keeps the discussion safely in the biological realm. As Philips argues:

By marginalizing that sex which is not reproductive, this approach . . . presents a key method of building a broad-based consensus. But it simultaneously fails to address the rights of those whose sexual behavior does not fit within a reproductive paradigm, who do not fit the chaste model of the innocent victim, and who are often most vulnerable to sexual exploitation and discrimination.<sup>43</sup>

*B. The doctrine of reproductive self-determination and its interpretation by the treaty monitoring bodies*

1. The treaty monitoring bodies

The three major human rights treaties under discussion here each have a committee<sup>44</sup> mandated to monitor the States Parties' compliance

42. *Id.* at 183-97.

43. Phillips, *supra* note 12, at 461-62. For a critical evaluation of the progress made after the Cairo Conference, see Sumati Nair, Preeti Kirbat and Sarah Sexton, *A Decade After Cairo, Women's Health in a Free Market Economy*, THE CORNER HOUSE, Summer 2004, available at <http://www.thecornerhouse.org.uk/summary.shtml?x=62140>. The authors argue that the Cairo Programme in fact endorsed a neo-liberal framework for reproductive health policy, in recent years most visibly executed in the context of international trade agreements. This is the result of women's organizations placing too much emphasis on reaching a common ground with population organizations, donor groups, and governments, resulting in an actual deterioration of women's access to reproductive health services in a great number of countries. *Id.* at 9-10.

44. The Committee on the Elimination of Discrimination against Women (CEDAW) is established under article 17 of the treaty:

(1) For the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination against Women (hereinafter referred to as the Committee) consisting, at the time of entry into force of the Convention, of eighteen and, after ratification of or accession to the Convention by the thirty-fifth State Party, of twenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as the principal legal systems. (2) The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties.

Each State Party may nominate one person from among its own nationals.

CEDAW, *supra* note 36, at art. 17. The ICCPR provides for the establishment of the Human Rights

with the treaty obligations by examining periodical country reports.<sup>45</sup> When a country report has been submitted, the independent human rights experts of the treaty body meet with representatives of the country under review, NGOs and UN agencies, after which consultations the committee sends its concluding observations to the reporting government.<sup>46</sup> Although the concluding observations are not legally binding, they can provide guidelines on the interpretation of treaty provisions in the same way that jurisprudence can clarify national legislation. Much depends, though, on the clarity of the country report and the data provided therein.<sup>47</sup>

In addition, the committees can issue general comments and general recommendations<sup>48</sup> as they see fit. These comments and recommendations are intended to give guidelines to States Parties on how to interpret the often broadly formulated human rights provisions and thus help governments with their proper implementation. As the committees are not judicial bodies and therefore cannot issue binding decisions,<sup>49</sup> the recommendations are, at most, an authoritative

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Committee ("HRC") in article 28:

(1) There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided. (2) The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience. (3) The members of the Committee shall be elected and shall serve in their personal capacity.

ICCPR, *supra* note 36, at art. 28. The Committee on Economic, Social and Cultural Rights ("CESCR") was established by the Economic and Social Council instead of under the ICESCR. Economic and Social Council, *International Covenant on Economic, Social and Cultural Rights*, ESC Res. 1985/17, U.N. Doc. No. E/1985/85.

45. See Office of the United Nations High Commissioner for Human Rights, Treaty Bodies (Feb. 2002), available at <http://www.unhchr.ch/pdf/leafletontreatybodies.pdf>.

46. A yearly report of all concluding observations is sent to the UN General Assembly. An NGO is a non-governmental organization. See <http://www.un.org/dpi/ngosection/index.asp>.

47. In addition to relevant and sufficiently detailed data information, it is important that the obligations, as well as the required performance standards, of States Parties with respect to the right under review are clear. See Audrey Chapman, *The Right to Health: Monitoring Women's Right to Health Under the International Covenant on Economic, Social and Cultural Rights*, 44 AM. U. L. REV. 1157, 1158-59 (1995).

48. CEDAW refers to its general comments as "general recommendations."

49. Both the ICCPR and CEDAW have an Optional Protocol under which individuals (and, in the case of CEDAW, individuals and groups) can bring complaints. The decisions of the committees are not enforceable, but by signing the Optional Protocol, States Parties have agreed to be bound to the judgments on the cases brought. See Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966). See also Optional Protocol to the Convention on the Elimination of Discrimination against Women, G.A. Res. 54/4, U.N. Doc. A/54/49 (Dec. 10, 1999).

interpretation of the rights embodied in the treaties. They also influence the concluding observations. By providing a clearer standard of compliance for States Parties, the concluding observations can be more specific as to what behavior is acceptable and what is not, which in turn contributes to the development of clearer standards by which to judge the States Parties.

## 2. The doctrine of sexual self-determination

When looking at the treaty monitoring bodies' consideration of sexual rights, one notices an interesting dichotomy. As relatively progressive as the committees are when considering matters related to family planning – condemning legislation criminalizing abortion and advocating the availability of safe measures of birth control – they are just as wary of the treatment of sex outside of the context of family and family planning. Nothing that comes close to a right to enjoy one's sexuality is formulated, nor are any particular strong statements made with respect to same-sex relationships. The failure of the treaties to deal outright with an important dimension of sexual self-determination – the freedom from coercion – is partly remedied by the committees by prohibiting forced marriages and repeatedly condemning domestic violence, including marital rape.<sup>50</sup> The HRC and CEDAW are the most outspoken on all aspects; the CESCR approaches sex as more of a biological issue and places great emphasis on reproductive health – its comments related to sexual rights are of a more indirect nature.<sup>51</sup>

The following section provides a brief survey of the interpretation of reproductive rights by the treaty bodies. An intentional omission here is a discussion of the sex worker and trafficking, which is relevant but merits a more elaborate discussion than can be rendered within this context. It is nevertheless briefly mentioned with regard to CEDAW as this is the only treaty with a specific provision on the subject. This provision is also taken as proscribing violence against women in general.

### *The autonomy to decide if and when to reproduce*

The right to freedom in reproductive decision-making is based upon broader principles of bodily autonomy and the right to physical integrity.<sup>52</sup> Reference to these concepts is usually made in the context of

50. See, e.g., ICCPR, *supra* note 36, at art. 23(3); UDHR, *supra* note 36, at art. 16(2); CEDAW, *supra* note 36, at art. 16(1)(a)(b) (regarding forced marriage).

51. See generally ICESCR, *supra* note 36.

52. *Bringing Rights to Bear*, *supra* note 36, at 16.

a right to privacy or the right to liberty and security of the person. The Universal Declaration of Human Rights states in article 12 that “No one shall be subjected to arbitrary interference with his privacy [or] family . . . . Everyone has the right to the protection of the law against such interference or attacks.”<sup>53</sup> Relevant rights in the ICCPR are – with a little stretch<sup>54</sup> – article 6 on the right to life,<sup>55</sup> article 9 on the right to liberty and security of person,<sup>56</sup> and article 17 on the right to privacy, which makes a specific reference to privacy in relation to family life.<sup>57</sup>

The most specific article on family planning is article 16 CEDAW.<sup>58</sup> In short, States Parties take it upon themselves to ensure that men and women have equal access to information regarding health care services related to family planning, as well as the possibility to make contraceptive choices. This forms an important part of what has been defined as sexual self-determination in the introduction: a woman’s right to decide freely if and when to reproduce. It should be borne in mind here though, that this only applies in so far as the right is given extensive interpretation. If there are any restrictions on the enjoyment of this right, such as the requirement of a connection to the concept of family, it would go against the idea of self-determination as it limits the enjoyment of sex for the sake of sex.

According to General Recommendation 21 on Equality in Marriage and Family Relations,<sup>59</sup> no reservations can be made to this article, as

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53. UDHR, *supra* note 36, at art. 12.

54. In practice, the Human Rights Committee does not interpret articles 6 and 9 very broadly for the sake of reproductive rights. ICCPR, *supra* note 36.

55. Article 6(1): “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” *Id.* at art. 6(1).

56. Article 9(1): “Everyone has the right to liberty and security of person . . . .” *Id.* at art. 9(1).

57. Article 17: “(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks.” *Id.* at art. 17.

58. It states:

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: . . . (e) The same rights to decide freely and responsibly on the number and spacing of children and to have access to the information, education and means to enable them to exercise these rights. . . .

CEDAW, *supra* note 36, at art. 16(1)(e). Another important article is article 10(h), which stresses the equal right of women to have access to information and education in order to help ensure “the health and well-being of families, including information and advice on family planning.” *Id.* at art. 10(h). Access to health care services, including “those related to family planning” should be ensured by States Parties on the basis of article 12(1). *Id.* at art. 12(1).

59. U.N. CEDAW, *General Recommendation No. 21: Equality in Marriage and Family*

that would be inconsistent with the principles of CEDAW. Yet, as practice has shown, this article is a favorite amongst States Parties when it comes to reservations and declarations of interpretation.<sup>60</sup> CEDAW also makes the connection to women's rights in marriage in General Recommendation 24,<sup>61</sup> which qualifies the right of married women to freely decide the number and spacing of children as fundamental.

The Human Rights Committee connects women's reproductive rights with their right to privacy under article 17 ICCPR in General Comment 28,<sup>62</sup> yet in its concluding observations noted concern that limited access for women to reproductive health services is a violation of women's right to equality<sup>63</sup> and their right to life.<sup>64</sup> The Committee's position on abortion laws is particularly outspoken: due to the relation between maternal mortality and abortion, it considers legislation criminalizing abortion as a violation of the right to life.<sup>65</sup> CEDAW has

*Relations* (13th Sess., 1994), U.N. Doc. A/49/38 in *Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies*, at 222, U.N. Doc. HRI/GEN/1/Rev.7 (2004), at 261 [hereinafter *General Recommendation No. 21*].

60. It has been said that CEDAW "has attracted the greatest number of substantive reservations with the potential to modify or exclude most, if not all, of the terms of the treaty," Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 A.J.I.L. 281, 317 (1991). For a survey of the wide practice of making reservations to CEDAW, see Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643 (1989-1990).

61. U.N. CEDAW, *General Recommendation 24: Women and Health* (20th Sess., 1999), U.N. Doc. A/54/38/Rev.1, ch. I, in *Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies*, at 281, U.N. Doc. HRI/GEN/1/Rev.7 (2004) [hereinafter *General Recommendation No. 24*].

62. U.N. HRC, *General Comment 28: Equality of Rights Between Men and Women*, art. 3, U.N. Doc. CCPR/C/21/Rev.1/add.10 (68th Sess., 2000), in *Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies*, at 181, para. 20, U.N. Doc. HRI/GEN/1/Rev.7 (2004) [hereinafter *General Comment No. 28*].

63. See U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Peru*, para. 20, U.N. Doc. CCPR/CO/70/PER (Nov. 15, 2000) [hereinafter *Peru HRC*]; U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Poland*, para. 11, U.N. Doc. CCPR/C/79/Add.110 (July 29, 1999) [hereinafter *Poland HRC*].

64. See U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Chile*, para. 15, U.N. Doc. CCPR/C/79/Add.104 (Mar. 30, 1999) [hereinafter *Chile HRC*]; *Peru HRC*, *supra* note 63; *Poland HRC*, *supra* note 63.

65. In the case of Ecuador, the Committee went as far as connecting a high suicide rate among young girls with the restrictive access to abortion and considering that as a violation of the young women's right to life. U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Ecuador*, para. 11, U.N. Doc. CCPR/C/79/Add.92 (Aug. 18, 1998). See also U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Republic of Guatemala*, para. 19, U.N. Doc. CCPR/CO/72/GTM

taken a similar approach, urging States Parties to legalize abortion with the view of reducing abortion-related deaths.<sup>66</sup> Especially in the case of rape, safe abortion should be easily accessible.<sup>67</sup> Increased availability of

(Aug. 27, 2001) [hereinafter Guatemala HRC]; Chile HRC, *supra* note 64; U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Costa Rica*, para. 11, U.N. Doc. CCPR/C/79/Add.107 (Apr. 4, 1999) [hereinafter Costa Rica HRC]; Poland HRC, *supra* note 63. Other than that, the Committee has requested the abolishment of restrictive abortion laws, see U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Argentina*, para. 14, U.N. Doc. CCPR/CO/70/ARG (Nov. 3, 2000) [hereinafter Argentina HRC]; Ecuador, *supra*; Guatemala HRC, *supra*; Peru HRC, *supra* note 63; Poland HRC, *supra* note 63.; U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Senegal*, para. 12, U.N. Doc. CCPR/C/79/Add. 82 (Nov. 19, 1997) [hereinafter Senegal HRC], as well as any other barriers barring the access to health information. See Guatemala HRC, *supra*; U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Mongolia*, para. 8(b), U.N. Doc. CCPR/C/79/Add.120 (Apr. 25, 2000) [hereinafter Mongolia HRC]; Poland HRC, *supra* note 63. Family planning counseling, see, e.g., Argentina HRC, *supra*, sex education, see Poland HRC, *supra* note 63, safe contraceptives, see Argentina HRC, *supra*; U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Colombia*, para. 37, U.N. Doc. CCPR/C/79/Add.76 (May 5, 1997) [hereinafter Colombia HRC]; U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Georgia*, para. 12, U.N. Doc. CCPR/C/79/Add.75 (May 5, 1997), and safe abortion services, Argentina HRC, *supra*; Guatemala HRC, *supra*, should be available on an equal basis, and the requirement that health personnel report on women undergoing abortion is considered unacceptable. See Chile HRC, *supra* note 64; U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Venezuela*, para. 19, U.N. Doc. CCPR/CO/71/VEN (Apr. 26, 2001) [hereinafter Venezuela HRC].

66. See U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Colombia*, para. 393-94, U.N. Doc. A/54/38 (Feb. 4, 1999) [hereinafter Colombia CEDAW]; U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Dominican Republic*, para. 349, U.N. Doc. A/53/38, (May, 14, 1998); U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Namibia*, Part II, para. 127, U.N. Doc. A/52/38/Rev.1 (Aug. 12, 1997) [hereinafter Namibia CEDAW]; U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Nepal*, para. 147-148, U.N. Doc. A/54/38/Rev.1 (July 1, 1999) [hereinafter Nepal CEDAW]; U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Paraguay*, para. 131, U.N. Doc. A/51/38 (May 9, 1996); U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Peru*, para. 340, U.N. Doc. A/53/38/Rev.1 (July 8, 1998).

67. See U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Jordan*, para. 180, U.N. Doc. A/55/38, (Jan. 27, 2000); U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Panama*, para. 201, U.N. Doc. A/53/38/Rev.1 (July 2, 1998) [hereinafter Panama CEDAW]; U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Venezuela*, para. 236, U.N. Doc. A/52/38/Rev.1 (Aug. 12, 1997) [hereinafter Venezuela CEDAW]; U.N. CEDAW, *Concluding Observations of the Committee on*



contraceptives<sup>68</sup> and other measures preventing abortion to be used as a means of birth control<sup>69</sup> are recommended. One cannot help but notice that both committees do not call for an unequivocal right to have an abortion; the committees state that it should not be criminalized by law, but the underlying argument (or justification) appears to be mainly health-based, namely the prevention of maternal mortality. CEDAW's exception to that line of reasoning with respect to rape is a significant but narrow one.

Sliding down the spectrum towards an exclusively health-risk-focused approach, we find the CESC, which in General Comment 14<sup>70</sup> focuses primarily on the reduction of maternal mortality rates. The need for better information on contraceptives has been addressed in relation to teenage pregnancies<sup>71</sup> and, according to the Committee, information programs should be used together with family planning policies as a means of reducing the use of abortion as a method for family planning.<sup>72</sup>

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*the Elimination of Discrimination Against Women: Uruguay*, para. 196, U.N. Doc. A/57/38 (Part I), (May 5, 2002).

68. U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Burundi*, para. 62, U.N. Doc. A/56/38 (Feb. 2, 2001) [hereinafter Burundi CEDAW]; U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Cameroon*, para. 60, U.N. Doc. A/55/38 (June 26, 2000) [hereinafter Cameroon CEDAW]; Colombia CEDAW, *supra* note 66, at para. 396; U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Democratic Republic of the Congo*, para. 228, U.N. Doc. A/55/38 (Feb. 1, 2000); U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Nicaragua*, para. 303, U.N. Doc. A/56/38 (July 31, 2001) [hereinafter Nicaragua CEDAW]; Venezuela CEDAW, *supra* note 67, at para. 243.

69. Burundi CEDAW, *supra* note 68, at para. 62; U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Kyrgyzstan*, para. 136, U.N. Doc. A/54/38 (Jan. 27, 1999); U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Romania*, para. 315, U.N. Doc. A/55/38 (June 23, 2000); U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Uzbekistan*, paras. 185-186, U.N. Doc. A/56/38 (Feb. 2, 2001); U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Vietnam*, para. 266, U.N. Doc. A/56/38 (July 31, 2001) [hereinafter Vietnam CEDAW]; U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Estonia*, para. 111, U.N. Doc. A/57/38 (Part I) (May 7, 2002).

70. U.N. CESC, *General Comment 14: The Right to the Highest Attainable Standard of Health*, art. 12, U.N. E/C.12/2000/4 (22nd Sess., 2000), in *Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies*, at 92, para. 21, U.N. Doc. HRI/GEN/1/Rev.7 (2004) [hereinafter *General Comment No. 14*].

71. See U.N. CESC, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social, and Cultural Rights: Cameroon*, para. 45, U.N. Doc. E/C.12/1/Add.40 (Dec. 8, 1999) [hereinafter Cameroon CESC].

72. See, e.g., U.N. CESC, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic,*

Yet, the CESCR is more reticent than the HRC and CEDAW, having requested the liberalization of abortion laws on merely one occasion,<sup>73</sup> in spite of its concern about the correlation between maternal mortality and abortions carried out outside the health profession.<sup>74</sup>

*The ability to enjoy one's sexuality free from coercion or pressure*

This category could be rooted in a number of the rights mentioned under the previous heading as well, in particular those referring to bodily integrity and autonomy. When it comes to a general reference to a right to be free from gender-based or sexual violence, CEDAW unfortunately falls short. There are two articles in the Convention that are considered to include the right to be free from sexual violence, article 5(a)<sup>75</sup> and article 6.<sup>76</sup> Article 5(a) prescribes the obligation of States Parties to eliminate “customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”<sup>77</sup> Appropriate measures to suppress the trafficking of women and “exploitation of prostitution of women” should be taken according to article 6.<sup>78</sup> Other international treaties<sup>79</sup> and declarations<sup>80</sup> have made more explicit reference to the prohibition of sexual violence against women, but within the context of the human rights documents under discussion here, much depends on the

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*Social, and Cultural Rights: Poland*, para. 12, U.N. Doc. E/C.12/1/Add.26 (June 16, 1998); U.N. CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social, and Cultural Rights: Senegal*, para. 47, U.N. Doc. E/C.12/1/Add.62 (Sept. 24, 2001); U.N. CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social, and Cultural Rights: Ukraine*, para. 31, U.N. Doc. E/C.12/1/Add.65 (Sept. 24, 2001).

73. U.N. CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social, and Cultural Rights: Nepal*, para. 33, U.N. Doc. E/C.12/1/Add.66 (Sept. 24, 2001) [hereinafter Nepal CESCR].

74. See Cameroon CESCR, *supra* note 71, at para. 25; U.N. CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social, and Cultural Rights: Mexico*, para. 29, U.N. Doc. E/C.12/1/Add.41 (Dec. 8, 1999); Nepal CESCR, *supra* note 73, at para. 32.

75. CEDAW, *supra* note 36, at art. 5(a).

76. *Id.* at art. 6.

77. *Id.* at art. 5(a).

78. *Id.* at art. 6.

79. See Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534.

80. See Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. Doc. A/48/49 (Dec. 20, 1993).

interpretation given to concepts such as liberty, security of person, and bodily integrity.

Even though violence against women does not have its own provision in CEDAW, it is high on the Committee's agenda, which is reflected by its concluding observations.<sup>81</sup> The starting point for the Committee is that violence against women exists in all countries and that not presenting data on the subject calls for further inquiries by CEDAW in order to obtain those.<sup>82</sup> Special attention is paid to the intersection with race and other social characteristics.<sup>83</sup> The Committee has comprehensively condemned domestic violence,<sup>84</sup> as well as sexual violence and sexual harassment in general. Domestic violence is explicitly taken to include marital rape, which governments are recommended to make punishable under criminal law.<sup>85</sup> Making the link between sexual violence and reproductive rights, the Committee has declared that sexual abuse of girls by older men violates girls' reproductive rights,<sup>86</sup> and the Committee has condemned the prohibition of abortion extended to cases of rape.<sup>87</sup>

The HRC's General Comment 28 condemns domestic violence,

81. See *infra* notes 82-87 and accompanying text.

82. See Cameroon CEDAW, *supra* note 68, at para. 65; U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Germany*, para. 306, U.N. Doc. A/55/38 (Feb. 2, 2000) [hereinafter Germany CEDAW]; U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Ireland*, para. 188, U.N. Doc. A/54/38 (July 1, 1999).

83. See, e.g., Germany CEDAW, *supra* note 82, at para. 318.

84. See Cameroon CEDAW, *supra* note 68, at para. 49-50; U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Egypt*, para. 342, U.N. Doc. A/56/38 (Feb. 2, 2001) [hereinafter Egypt CEDAW]; Germany CEDAW, *supra* note 82, at paras. 306, 308; U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Italy*, para. 359, U.N. Doc. A/52/38/Rev.1, Part II (Aug. 12, 1997); U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Netherlands*, para. 207, U.N. Doc. A/56/38 (July 31, 2001); U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: New Zealand*, para. 279, U.N. Doc. A/53/38/Rev.1 (July 9, 1998); Venezuela CEDAW, *supra* note 67, at para. 233; Vietnam CEDAW, *supra* note 69, at para. 258.

85. See, e.g., Egypt CEDAW, *supra* note 84, at para. 344; U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Greece*, para. 192, U.N. Doc. A/54/38 (Feb. 2, 1999); Namibia CEDAW, *supra* note 66, at Part II, para. 120; U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Thailand*, para. 243, U.N. Doc. A/54/38 (Feb. 2, 1999); Vietnam CEDAW, *supra* note 69, paras. 258-59.

86. See Nicaragua CEDAW, *supra* note 68, at paras. 298-99.

87. See Colombia CEDAW, *supra* note 66, at para. 393; Nepal CEDAW, *supra* note 66, at para. 147; Panama CEDAW, *supra* note 67, at para. 201; Venezuela CEDAW, *supra* note 67, at para. 236.

together with sexual violence against women<sup>88</sup> as a violation of article 7 ICCPR and the Committee's Concluding Observations on domestic violence are numerous,<sup>89</sup> reiterating that all domestic violence - including marital rape<sup>90</sup> - should be criminalized.<sup>91</sup> The CESCR considers domestic violence against women a health risk,<sup>92</sup> as stated in

88. *General Comment 28*, *supra* note 62; Argentina HRC, *supra* note 65, at para. 15; U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Czech Republic*, para. 23, U.N. Doc. CCPR/CO/72/CZE (Aug. 27, 2001) [hereinafter Czech Republic HRC]; U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: India*, para. 16, U.N. Doc. CCPR/C/79/Add.81 (Aug. 4, 1997) [hereinafter India HRC]; U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Japan*, para. 30, U.N. Doc. CCPR/C/79/Add.102 (Nov. 19, 1998) [hereinafter Japan HRC]; U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Russian Federation*, para. 14, U.N. Doc. CCPR/C/79/Add.54 (July 26, 1995) [hereinafter Russian Federation HRC]; U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Comments of the Human Rights Committee: United States of America.*, para. 285, U.N. Doc. CCPR/C/79/Add.50, A/50/40 (Oct. 3, 1995); U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Uruguay.*, para. 9, U.N. Doc. CCPR/C/79/Add.90 (Apr. 8, 1998); Venezuela HRC, *supra* note 65, at paras. 17, 20, 26.

89. Some examples are Argentina HRC, *supra* note 65, at para. 15; Colombia HRC, *supra* note 65, at para. 27; U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Guyana*, para. 14, U.N. Doc. CCPR/C/79/Add.121 (Apr. 25, 2000); India HRC, *supra* note 88; Japan, *supra* note 88; U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Mexico*, para. 17, U.N. Doc. CCPR/C/79/Add.32 (Apr. 18, 1994); Russian Federation HRC, *supra* note 88; Senegal HRC, *supra* note 65, at para. 13; U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Uzbekistan*, para. 19, U.N. Doc. CCPR/CO/71/UZB (Apr. 26, 2001) [hereinafter Uzbekistan HRC]; U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Yemen*, para. 255, U.N. Doc. CCPR/C/79/Add. 51, A/50/40 (Oct. 3, 1995) [hereinafter Yemen HRC]; U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Zimbabwe*, para. 14, U.N. Doc. CCPR/C/79/Add. 89 (Apr. 6, 1998) [hereinafter Zimbabwe HRC].

90. See India HRC, *supra* note 88; Mongolia HRC, *supra* note 65, at para. 8(g); Uzbekistan HRC, *supra* note 89; Zimbabwe HRC, *supra* note 89.

91. See Costa Rica HRC, *supra* note 65, at para. 12; Czech Republic HRC, *supra* note 88, at para. 14; U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Guatemala*, para. 33, U.N. Doc. CCPR/C/79/Add.63 (Apr. 3, 1996); Japan HRC, *supra* note 88; U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: The Kyrgyz Republic*, para. 14, U.N. Doc. CPR/CO/69/KGZ (July 24, 2000); Russian Federation HRC, *supra* note 88; Senegal HRC, *supra* note 65, at para. 13; Uzbekistan HRC, *supra* note 89; Yemen HRC, *supra* note 89.

92. *Id.* at para. 21.

General Comment 14.<sup>93</sup> Legislation that does not proscribe marital rape has been criticized in a number of Concluding Observations.<sup>94</sup>

CEDAW also defines forced marriage as a form of violence against women in General Recommendation 19.<sup>95</sup> Applying this concept in its Concluding Observations, CEDAW has recommended that States criminalize the practice of forced marriage and also provide training for State officials to create a greater sensitivity to this and other types of violence against women.<sup>96</sup> The Human Rights Committee follows this line of reasoning in General Comment 28 on the Equality of Rights between Men and Women,<sup>97</sup> in which it underlines that women have a right to freely make an informed choice on whom they marry. However, the Committee has not fully integrated these statements in its Concluding Observations beyond a repeated expression of general concern.<sup>98</sup> It has made some recommendations on eliminating the practice though, including education aiming to change social attitudes

93. *General Comment No. 14*, *supra* note 70, at 92.

94. *See* U.N. CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social, and Cultural Rights: Egypt*, para. 35, U.N. Doc. E/C.12/1/Add.44 (May 23, 2000); U.N. CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social, and Cultural Rights: Mongolia*, para. 23, U.N. Doc. E/C.12/1/Add.47 (Sept. 1, 2000); U.N. CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social, and Cultural Rights: Syrian Arab Republic*, paras. 24, 40, U.N. Doc. E/C.12/1/Add.63 (Sept. 24, 2001) [hereinafter Syrian Arab Republic CESCR].

95. U.N. CEDAW, *General Recommendation No. 19: Violence against Women* (11th Sess., 1992), U.N. Doc. A/47/38, in *Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies*, at 247, U.N. Doc. HRI/GEN/1/Rev.7 (2004) [hereinafter *General Recommendation No. 19*].

96. *See, e.g.*, U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Guinea*, paras. 134-35, U.N. Doc. A/56/38 (July 31, 2001), and Vietnam CEDAW, *supra* note 69, at paras. 258-59.

97. *General Comment No. 28*, *supra* note 62, at 182.

98. *See, e.g.*, India HRC, *supra* note 88; U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Kuwait*, para. 7, U.N. Doc. CCPR/CO/69/KW T (July 27, 2000); U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Nigeria*, para. 291, U.N. Doc. CCPR/C/79/Add.65, A/52/40 (July 24, 1996) [hereinafter Nigeria HRC]; U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Peru*, para. 14, U.N. Doc. CCPR/C/79/Add.72 (Nov. 18, 1996); U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Sudan*, para. 11, U.N. Doc. CCPR/C/79/Add.85 (Nov. 19, 1997); U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Syrian Arab Republic*, para. 20, U.N. Doc. CCPR/CO/71/SYR (Apr. 24, 2001); Venezuela HRC, *supra* note 65, at paras. 18, 20; Zimbabwe HRC, *supra* note 89, at para. 12.

towards forced marriage<sup>99</sup> and legal reform.<sup>100</sup> The CESCR has spoken out against forced marriage in its Concluding Observations<sup>101</sup> by urging countries to focus on the elimination of the practice as well as the customary beliefs that encourage it, but this viewpoint has not made its way into the Committee's general comments yet.

*Sexual self-determination beyond freedom from coercion and unwanted pregnancy: women's freedom to enjoy their sexuality on a par with men*

None of the committees make reference to reproductive rights beyond the principle of freedom from coercion and the right to make independent decisions on procreation, nor do they formulate a right of women to enjoy their sexuality on a par with men. The only references which can be interpreted as sex outside the realm of procreation are made with respect to sexual orientation and then often in connection with the family concept, except for the CESCR, which takes a stand only in relation with the access to health care<sup>102</sup> and has just once asked a State to proscribe discrimination on the basis of sexual orientation in its Concluding Observations.<sup>103</sup>

In its General Recommendation 21 on Equality in Marriage and Family Relations,<sup>104</sup> CEDAW asserts that "family" can mean various things depending on a number of factors such as religion, custom, and tradition.<sup>105</sup> The Human Rights Committee lays down a similar principle and says that whichever concept is accepted in a particular country, it should be given the protection against discrimination in the ICCPR's implementation as guaranteed in article 2.<sup>106</sup> This provides not much of a

99. See, e.g., India HRC, *supra* note 88; Nigeria HRC, *supra* note 98.

100. See, e.g., U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Monaco*, para. 12, U.N. Doc. CCPR/CO/72/MCO (Aug. 28, 2001); Venezuela HRC, *supra* note 65, at paras. 18, 20.

101. See Cameroon CESCR, *supra* note 71, at paras. 14, 33; U.N. CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social, and Cultural Rights: Kyrgyzstan*, paras. 16, 23, 30, U.N. Doc. E/C.12/1/Add.49 (Sept. 1, 2000); Syrian Arab Republic CESCR, *supra* note 94, at paras. 14, 31.

102. *General Comment No. 14*, *supra* note 70.

103. See U.N. CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social, and Cultural Rights: China-Hong Kong SPECIAL Administrative Region*, para. 31, U.N. Doc. E/C.12/1/Add.58 (May 21, 2001).

104. *General Recommendation No. 21*, *supra* note 59, at 261.

105. *Id.* at 256.

106. U.N. HRC, *General Comment No. 18: Non-Discrimination* (37th Sess., 1989), in

basis for a same-sex couple to obtain recognition as a family by appealing to the ICCPR, even though the Committee has condemned discrimination on grounds of sexual orientation in its Concluding Observations.<sup>107</sup> CEDAW has also spoken out against discrimination on the grounds of sexual orientation in its Concluding Observations; it has – as the only treaty body so far – considered sexual orientation a valid ground for asylum,<sup>108</sup> and it has expressed its concern about the criminalization of homosexuality.<sup>109</sup> Yet, from a committee that has empowerment of women as a guiding principle and has agreed upon using the Cairo Programme as a guideline for developing performance standards in its general recommendations,<sup>110</sup> one might expect a more progressive approach. Surely, it would be a difficult task to define which parameters could be used to measure government compliance, but that should not stop the Committee from formulating a standpoint that truly empowers women – explicitly establishing them as sexual beings beyond reproduction.

### PART III: EXTENSIVE INTERPRETATION OR REDEFINITION?

An explicit right for women to enjoy their sexuality on equal terms is not formulated in any of the treaties. On the basis of the formulation of the rights connected to reproductive self-determination, there appears to be a stronger basis for the component related to the freedom to decide whether to reproduce than for the freedom to enjoy one's sexuality free from coercion. For the latter, the emphasis lies on freedom from violence, not on the aspect of enjoyment. How far this freedom extends depends on the interpretation of the rights enumerated and in particular whether any explicit or implicit connection to some sort of family life is required.

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Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies, at 147, para. 5, U.N. Doc. HRI/GEN/1/Rev.7 (2004).

107. See, e.g., U.N. HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: United Kingdom and Northern Ireland-The Crown Dependencies of Jersey, Guernsey and the Isle of Man*, para. 14, U.N. Doc. CCPR/C/79/Add.119 (Mar. 27, 2000).

108. U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Sweden*, para. 334, U.N. Doc. A/56/38 (July 31, 2001).

109. See, e.g., U.N. CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Mexico*, para. 420, U.N. Doc. A/53/38 (May 14, 1998).

110. U.N. CEDAW, *General Recommendation No. 22, Amending Article 20 of the Convention* (14th Sess., 1995), U.N. Doc. A/50/38, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 250, U.N. Doc. HRI/GEN/1/Rev.6 (2003).

Looking at the recommendations and observations made by the treaty bodies, we can conclude that their strongest points are freedom from coercion and the freedom to make reproductive decisions. In both cases the HRC and CEDAW are the most outspoken; the CESCR tends to make less strong statements, and if it does, the comments have a qualifying connection with health issues. Besides some relatively weak references in the context of the rights of same-sex couples under the treaty regimes, no reference can be found to matters related to sex beyond procreation, and even then the references are made in connection with the concept of family.

One can only guess why the respective committees have not yet addressed this aspect of sexual rights. A possible motive could be that it is difficult for the committees' members to reach consensus on the matter and that therefore the focus has remained on the more clear-cut subject of sex as biology. On the other hand, abortion and birth control are controversial subjects in their own right, and negotiations on declarations such as those made by the Cairo and Beijing conference have not lacked ample resistance from the Holy See and a great number of Catholic and Islamic countries.<sup>111</sup> In addition, it is not necessarily true that reaching a broad consensus yields the best result for women's reproductive rights. The Cairo Programme of Action was the result of extensive lobbying by women's organizations, but it has been argued to have actually resulted in a setback instead of a step forward.<sup>112</sup>

Another reason could be that the committees have not yet found a way to incorporate sexual rights as defined by Cairo and Beijing broadly into their work, or do not consider them important enough to be put high on their agendas alongside matters such as reproductive health. The question that follows is whether this is a subject on which the committees should develop their own doctrine, or whether the treaties lack sufficient definition of sexual rights such that the committees ought to give it the attention it needs by codifying standards.

Even though the setting of a clear, well-defined standard may seem appealing at first sight, there are sufficient grounds on which to argue against codification of a right to sexual self-determination, at least at this

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111. See Rishona Fleishman, Comment, *The Battle Against Reproductive Rights: The Impact of the Catholic Church on Abortion Law in Both International and Domestic Arenas*, 14 EMORY INT'L REV. 277, 283-89 (2000). For a brief moment, it looked like the Vatican and a number of Islamic groups were willing to form an occasional alliance at the Cairo Conference to block an all too liberal take on abortion and same-sex relationships. See *The Vatican and Islamic Groups at Cairo*, POPULATION NETWORK NEWS (Chantal Worzala ed., Human Development Dept. no. 9, Fall 1994), available at <http://www.worldbank.org/html/extdr/hnp/hddflash/pnn/pnn9c.html>.

112. See Nair et al., *supra* note 43.



point. Fried and Landsberg-Lewis, who discuss the possibilities of developing an agenda for sexual rights beyond the Cairo and Beijing conferences,<sup>113</sup> affirm that it is important that sexual rights are acknowledged as a fundamental aspect of women's human rights and human dignity, but they argue that it is important to "sustain the fluidity of the concept and its ability to include an ever-growing understanding of the range of experiences heterosexual, lesbian, bisexual, and transgendered women have as sexual beings and to expand the boundaries of what sexual rights mean, rather than limiting its application and meaning with over-definition."<sup>114</sup> A set definition – if one could even be drafted properly – would perhaps make it easier for an individual or human rights organization to make a claim about the violation of these rights, but at the same time, a fixed definition entails the risk of excluding certain situations and therefore resulting in an applicability that is more limited than would be desirable.

The problem of exclusion by means of definition naturally does not apply to reproductive rights alone, but it might play a more significant role due to the special nature of sexual rights. As only limitedly surveyed in Part II, the issue of reproductive rights is interconnected with a great number of different rights, each of which entail a different type of State obligation, thereby making it more difficult to catch everything in one definition. As Fried and Landsberg-Lewis put it, the protection of sexual rights poses a strong challenge to the human rights framework, as it calls for the articulation of the "other side" of human rights, namely "the positive assertion of the full exercise and enjoyment of rights, including free expression of sexual identity."<sup>115</sup> In other words: sexual rights require action that would constitute a significant step beyond protection.<sup>116</sup>

Another difficulty is fitting a theoretical definition of a right to sexual self-determination into the mold of purportedly neutral phrasing and equality-focused terminology as generally used in the human rights doctrine. Women need special protection when it comes to their reproductive rights, yet if such a right would be formulated in terms of equality, this implies equality to a male standard, which then excludes anything falling outside this model.<sup>117</sup> Arguably, the focus should not be

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113. Fried & Landsberg-Lewis, *supra* note 33, at 114-16

114. *Id.* at 114.

115. *Id.* at 116.

116. Miller, *supra* note 40 and accompanying text.

117. Fried & Landsberg-Lewis, *supra* note 33, at 115.

on such formal equality, but rather on effective equality.<sup>118</sup> The way to achieve such *de facto* equality certainly is not one and the same in all situations, and it would depend on the particular situation in each country what type of action is required. Starting with measures such as legal reform, one could think of education and other means of informing people and raising public awareness – not only in relation to, for example, the use of contraceptives and family planning, but also in order to challenge certain stereotypes or cultural practices existing within society that have a detrimental effect on women's enjoyment of their sexual rights. Women's organizations could play a significant role here.<sup>119</sup> By incorporating women's reproductive rights, including their right to sexual self-determination, into their agendas<sup>120</sup> instead of treating it as a separate issue, eventually a more heightened awareness can be created which eventually could lead to the treaty bodies raising the issue more easily outside of the obvious context of health and family.

With respect to how broad an issue on the agenda this should be, it is important that women's organizations and human rights NGO's take the lead in interpreting reproductive rights as broadly as possible. It is perhaps a natural reflex to consider the right to enjoy one's sexuality insignificant when faced with situations in which women are forced to marry a partner that is not of their choice at a young age, have no means to prevent or end an unwanted pregnancy even if it was the result of non-consensual intercourse, or cannot find any legal redress when they are the victim of sexual violence within or outside of wedlock. Yet, that there are situations that are more egregious than not being able to be the sexual person one wants to be does not make the issue of sexual self-determination less important. On this point I would like to quote Lynn Freedman, who argues that reproduction and sexuality have an intrinsic value as an essential element of human dignity: "Although control over reproduction and sexuality is certainly an essential precondition for women's ability to exercise other rights and to fulfill other basic needs, it is also a worthy and valuable end in its own right, and not merely a means to reach other ends."<sup>121</sup> That there are other obstacles on the road to women's full enjoyment of their right to sexual self-determination that

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118. *Id.*

119. *See id.* at 116-20.

120. Fried and Landsberg-Lewis name a number of examples in their article, but the list, which includes Amnesty International and a number of local organizations, is not extensive. *Id.*

121. Lynn P. Freedman, *Censorship and Manipulation of Reproductive Health Information: An Issue of Human Rights and Women's Health*, in *THE RIGHT TO KNOW: HUMAN RIGHTS AND ACCESS TO REPRODUCTIVE HEALTH INFORMATION* 5 (Sandra Coliver ed., University of Pennsylvania Press 1995).

need to be addressed does not mean that goal should not be kept in sight in its full form, repeatedly articulated and affirmed, and integrated in the human rights doctrine.

A final significant roadblock for the committees taking a more progressive stance is a factor that has only been touched upon in this article, and that is the fact that a real right to sexual self-determination and independence – outside the confines of a family bond – besides the endorsement of ‘loose’ sexual behavior by women in general, automatically includes the possibility of same-sex relationships. As Phillips voices the problem:

The concept of sexual rights brings to the center stage the tense relationship between claims to universality inherent in human rights and cultural relativism of expressions of intimacy, reproduction, gender relations, and identity that are so frequently central to national, religious, and moral discourses. . . . While . . . claims [to traditional culture or religious values] have been unequivocally rejected as a defense for other forms of discrimination, this does not appear to be so clearly the approach when it comes to issues of sexual orientation.<sup>122</sup>

This complex issue cannot be done justice within the scope of this brief article, but it would certainly be worth asking the question why the committees have little trouble speaking out against other highly culturally determined practices such as arranged marriage or female genital cutting,<sup>123</sup> yet show such restraint when it comes to sex.<sup>124</sup>

### CONCLUSION

The three main treaty monitoring bodies have not yet acknowledged an all-encompassing right to sexual self-determination for women. They have affirmed, in various levels of decisiveness, the right to enjoy reproductive rights free from coercion or pressure and the freedom to decide if and when to reproduce. The unlinking of sex from reproduction or the family concept, however, is a step the committees

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122. Phillips, *supra* note 12, at 463.

123. U.N. CEDAW, *General Recommendation No. 14: Female Circumcision* (9th Sess., 1990), in *Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies*, at 211, U.N. Doc. HRI/GEN/1/Rev.7 (2004); *General Recommendation No. 19*, *supra* note 95, at paras. 11, 20, 24(1); *General Recommendation No. 24*, *supra* note 61, at para. 15(d); *General Comment No. 28*, *supra* note 62, at para. 11; *General Comment No. 14*, *supra* note 71, at para. 22.

124. On the shortcomings of CEDAW and the UDHR when it comes to the position of lesbians, see Nadine Gartner, *Articulating Lesbian Human Rights: The Creation of a Convention on the Elimination of all Forms of Discrimination Against Lesbians*, 14 UCLA WOMEN'S L.J. 61 (2005).

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have yet to take.

It is important that they do not go down the path the U.S. Supreme Court has taken, interpreting sex as a subset of what is apparently considered a more valuable type of inter-human relationship, and thereby casting a glooming shadow of Puritanism over what should be a positive aspect of people's lives. Sex is an important part of who we are, and it is a part women should be equally capable of exploring as men. And if the treaty bodies have trouble talking about sex, civil society should continue addressing the subject within all relevant contexts until they do. Hopefully, it will not take them too long to stop and listen.